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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1198

EDGAR D. WHITCOMB, Governor of the State of Indiana,

Appellant,

v.

PATRICK CHAVIS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The ACLU Foundation, Inc., Alabama Civil Liberties Union, and the Alabama Independent Democratic Party move the Court for leave to file the attached Amicus Curiae Brief.

The case raises issues with respect to the right of Negroes to be represented effectively in state legislatures, and the degree of proof that must be developed to establish that a multi-member legislative district results in the minimization or cancelling out of the voting strength of predominately Negro areas in metropolitan counties throughout the United States.

Movants desire to discuss facts and questions of law relevant to this issue of vital concern to black citizens in urban areas. Movants or their attorneys are involved in similar litigation in Alabama, *Nixon v. Brewer*, No. 3017-N (M.D. Ala., order postponing relief entered March 4, 1970). Movants believe that their discussion, based on experience in similar pending litigation, will assist in arriving at a correct result on this issue of importance to all urban areas. Movants believe that the discussion in the attached brief will present considerations not advanced by the parties.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
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AMICUS CURIAE BRIEF

INTEREST OF THE AMICUS CURIAE

This brief is submitted on behalf of the ACLU Foundation, Inc., the Alabama Civil Liberties Union, and the Alabama Independent Democratic Party.

The ACLU Foundation, Inc. (a charitable and educational foundation affiliated with but separate from the American Civil Liberties Union) and the Alabama Civil Liberties Union (a state affiliate of the American Civil Liberties Union), have provided counsel to plaintiffs in *Nixon v. Brewer*, No. 3017-N (M.D. Ala. filed January 13, 1970), now pending before a three-judge court. These

amici have been active in securing the benefits of the one-man one-vote principle and in securing for Negro citizens the benefits of the thirteenth, fourteenth, and fifteenth amendments.

The Alabama Independent Democratic Party, an incorporated political party composed of both black and white citizens of Alabama, is an intervening plaintiff in *Nixon*.

As shown by the Opinion entered on plaintiffs' Motion for Preliminary Injunction in the *Nixon* case (appended to this brief at 1a), the plaintiffs there seek an order requiring the election of both Senators and Representatives in the legislature of Alabama from the three most populous counties in the states — Montgomery, Mobile, and Jefferson — from single-member districts. The plaintiffs maintain that the election of Senators and Representatives from these counties on a county-wide basis minimizes or cancels the voting strength of Negro citizens residing in the predominately Negro areas in these counties. This deprives them of the equal protection of the law guaranteed by the fourteenth amendment, and debases their vote for legislators in violation of the fifteenth amendment.

About 40 percent of the black citizens of Alabama reside in these three largest counties in Alabama. They comprise 38 percent of the population of Montgomery County, 32 percent of Mobile County, and 35 percent of Jefferson County (including Birmingham). However, no Negro has been elected from any of these counties to either house of Alabama's legislature since Reconstruction. Serious efforts have been made to accomplish such election as recently as the 1970 Democratic primaries, but to no avail. Only the sub-districting of these counties

will extend the benefit of the one-man one-vote principle to the more than 386,010 (1960 population) black citizens of these counties and effectuate the fifteenth amendment.

The foundation of *Nixon* is the same as that of *Whitcomb*, although *Whitcomb* presents certain procedural and remedy problems not present in *Nixon*. The decision of this case may be largely determinative of the proof that will be required and the relief ultimately to be granted in Alabama.

STATEMENT OF THE CASE

Amici adopt appellees' statement of the case.

ARGUMENT

A. Introduction

The 1970 census of population has been taken. The data is now being processed. Soon the legislatures of the fifty states will be considering apportionment plans based on this data, as partisan apportionment proposals wend their ways through the legislative process. Historically we know that one of the purposes of some of the proposals will be to reduce or eliminate the representation of black voters in our state legislatures. Schemes will be attempted that go as far as it is possible to go and still withstand the attacks expected in the courts under the latest judicial pronouncements. The decision in this case will largely determine the extent of possibility of direct black representation afforded by these apportionment enactments.

Increasingly, the device of at-large elections of representatives from multi-member districts has emerged

as the means to deny effective representation to substantial minority groups while appearing to comply with the "one-man, one-vote" edict of *Reynolds v. Sims*, 377 U.S. 533 (1964). The massing of smaller political subdivisions into multi-member districts can reduce population variations in apportionment schemes; but it can also substantially minimize or cancel the votes of minority groups.

The United States Commission on Civil Rights in its report, *Political Participation* (1968) contains a chapter entitled "Diluting the Negro Vote by Switching to At-Large Elections." It is there stated:

> Where Negroes are heavily concentrated in particular election districts, their votes can be diluted effectively by converting to at-large elections, in which their votes are outweighed by white votes in adjoining districts. This technique has been used in Mississippi and Alabama. *Id.* at 21.

When a county with a black majority is merged into a multimember district with counties having white majorities sufficient to cancel out the voting strength of the black majority in the county merged, the unconstitutional effect is easily seen. Such districts were stricken down in *Sims v. Baggett*, 247 F. Supp. 96, 110 (M.D. Ala. 1965) (the remand of *Reynolds v. Sims*). But in the urban county the effect, more subtle, is just as discriminatory where areas with substantial concentration of black voters are merged into county-wide, at-large, multi-member election districts.

In Alabama, for example, according to the 1960 census a black population of over 386,000 was concentrated in the three metropolitan counties of Jefferson, Mobile, and Montgomery. Using pure ratios of population to rep-

resentation, this number of people would elect twelve members of the Alabama House of Representatives and four members of the Senate. But in each county the black citizens were a minority: Jefferson, 35 percent; Mobile, 32 percent; Montgomery, 38 percent. Each of these counties is a single multi-member district; together they elect 35 of Alabama's 105 Representatives and 12 of the 35 Senators.[1] Instead of electing 12 of these 35 Representatives, the Negro voters — who, like white voters in the South, have established voting patterns — elect none. Instead of electing four of these twelve Senators, they elect none. The voting strength of these black citizens is not only minimized; it is cancelled out.

The fact that dilution of this nature has in fact been permitted to stand in cases such as *Fortson v. Dorsey*, 379 U.S. 433 (1965); *Burnette v. Davis*, 382 U.S. 42 (1965); *Burns v. Richardson*, 384 U.S. 73 (1966); and *Kilgarlin v. Hill*, 386 U.S. 120 (1967), will spawn, we believe, a massive effort, organized and unorganized, to use the multi-member district as a device to prevent, or minimize, the election of black legislators. Only a clear and affirmative decision by this court can permit the 1970's to be a decade in which black citizens of America are admitted to "the essence of a democratic society . . . [and] the heart of representative government," *Reynolds v. Sims*, 377 U.S. 533, 535 (1964). This is the opportunity they must have if they are to participate in, and work within, our democratic system. For over a century black citizens in many areas of our country have had to turn repeatedly to the federal courts and the Congress to secure and

[1] The county figures are:

	Representatives	*Senators*	*Total*
Jefferson	20	7	27
Mobile	10	3	13
Montgomery	5	2	7
	35	12	47

protect their rights. Direct state legislative representation is essential for providing them an effective voice and a fair hearing in state governments which make and administer by far the largest number of the laws under which they live.

We believe that the opportunity for direct representation of black voters by selection of legislators of their own choosing in the state legislatures is essential to help America put behind it the racial tensions which surfaced throughout the nation, North and South, East and West, in the sixties. Only by the practical requirement that legislative apportionment be on a single-member district basis with districts composed so as to prevent the cancelling out or minimization of the voting strength of black voters, can the system be made to work effectively for the black citizens of America — and for the other geographically cohesive racial, economic, and political minority elements of our cities and states.

The record in this case illustrates the way multi-member districts result in an effective racial gerrymander in a northern metropolitan county. But it should be emphasized that the facts of this record are not as extreme as those in Alabama. The Center Township ghetto in Marion County, Indiana, has had only 4.75 percent of the county's Senators and only 5.97 percent of the county's Representatives, although this predominately black area has 17.81 percent of the county's population. But in Alabama, the ghettoes of Jefferson, Mobile, and Montgomery Counties, with their thirty to forty percent of the Counties' residents, have had, by the same yardstick, *zero* percent of the legislators. The Court should strike down the Indiana racial gerrymander by upholding the decision of the District Court requiring the subdivision of Marion County, Indiana, into single-

member districts. This affirmance should implement two separate Constitutional protections:

1) Wherever a racial minority is shown to reside in a cognizable area within a political subdivision in sufficient numbers to entitle them to elect one or more members of their state legislature, the fourteenth and fifteenth amendments require that legislators from the subdivision be elected from single-member districts drawn so as not to minimize or cancel out the voting strength of such racial minority.

2) Because of the tendency of people of similar racial, economic, and political characteristics to live or be forced to live in concentrated areas, the use of multi-member districts for the election of members of legislative bodies is *prima facie* in violation of the equal protection and due process clauses of the fourteenth amendment so that, in such circumstances, the burden would fall to the state to establish that each multi-member district does not result in the minimization or cancelling out of the voting strength of any racial, economic, or political element within the district.

Such a holding is essential to guarantee a meaningful right to vote and equal protection of the laws to black citizens of this nation at this point of time in our history. It is likewise essential to provide other minority political elements of our states a fair chance to be heard in, and to participate in, the legislative process. No state legislature can be expected to solve effectively many of our most serious problems if substantial minorities are effectively denied representation in them.

Just as the establishment of the one-man one-vote principle was essential to the giving of fair voice in state

democratic processes to those who are a part of a population majority, we believe that the requirement of fairly drawn single-member districts is equally essential to providing the opportunity for democratic expression by those citizens who are a part of a racial minority, be it a black minority in an area with a white majority, or a white minority in an area with a black majority.

B. *Multi-member Districts Are Invalid Where The Voting Strength Of A Racial Or Political Element Is Minimized Or Cancelled Out*

Although it refused to affirm the lower court's order eliminating the use of multi-member districts by the Senate of Georgia as a per se violation of the fourteenth amendment, the Court in *Fortson v. Dorsey*, 379 U.S. 433 (1965), did recognize the potential threat to racial and political minorities by the use of multi-member districts:

> It may well be that designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. The question, however, is not presented by the record before us. 379 U.S. at 439.

The problem was considered again in *Burns v. Richardson*, 384 U.S. 73 (1966), but the Court, relying on *Fortson*, held that the demonstration of invidious discrimination could not be based on "conjecture," 384 U.S. at 88.

The evil is now "demonstrated." "Conjecture" is now proof.

The burden of proof should be met by the showing of the existence, within a definable geographical area, of a cognizable racial or political element of the voting popu-

lation sufficient in numbers to warrant the apportionment of a member of either house of a state legislature to such area. If a county of 30,000 population would be entitled to elect a legislator, a group of 30,000 members of a racial minority residing in a cognizable area within a large county should be accorded the same apportionment entitlement. If making a multi-member district would minimize or make possible the cancelling out of the voting strength of a cognizable racial minority group, such a multi-member district would be invalid.

The district court here did not rely solely or even principally, on the racial make-up of the Marion County ghetto, although it was clearly a predominately (99.8 percent) black population area, 305 F. Supp. at 1373. It considered the socio-economic factors such as owner-occupied dwellings, crowded dwellings, dilapidated housing, old age assistance recipients, high school graduates, unemployment rates, juvenile delinquency cases, family income, and automobile ownership among its "Critical Differentiating Characteristics." 305 F. Supp. at 1371-99. On the basis of these facts, it determined that a cognizable, predominantly black, cohesive group of citizens inhabited an area of the county which met the criteria for classification as a ghetto area, and, as such, constituted a political element whose voting strength was minimized and rendered ineffective by their submergence in a multi-member district.

The findings of the court are supported by the record and certainly meet the criteria of *Fortson* for proving a cognizable racial or political element whose voting strength is minimized or cancelled out by its inclusion in a multi-member district. It would appear that, given our well-known history of discrimination against Negroes, the mere proof of a substantial Negro population, concentrated within a cognizable area in sufficient numbers to

be entitled to two members of the Indiana House of Representatives and one member of the Indiana Senate, should alone meet the requirements of *Fortson* and *Burns*.

The relevance of the district court's "Critical Differentiating Characteristics" is, first, they should establish once and for all that Negroes, whether in the North or South, are victims of social and economic discrimination of the type that could be, but has not been, remedied by state legislatures. They are our "education in the obvious"[2] and should not need to be re-proved for every urban ghetto. Second, use of these factors should be approved for application to *any* geographically cognizable political element without regard to the racial makeup of the area. The proof of either racial concentration *or* other "differentiating factors" should be sufficient to condemn the employment of a multi-member district for the selection of legislators.

The fact that a resident of the minority area had been elected by a majority of all the voters of a multi-member district would not offset such proof because the minority group should be able to elect the man who best speaks for them, whether he be popular with other voters in the larger multi-member district or not. In this case, three Negro representatives were elected to represent Marion County in the Indiana Legislature. None carried the ghetto voting area. All were elected by white voters outside the area.

The only way black voters, as part of a minority, can have an impact on elections is to vote in bloc. If there is a run-off election system, as in Alabama, that vote is as likely to be used to attempt to defeat their candidate as it is to elect him. See Appendix B and C (pp. 9a-11a,

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[2] O. W. Holmes, *Law and the Court*, in *Collected Legal Papers*, 291, 292-93 (1921).

infra) for "Bloc Vote" advertisements used on behalf of George Wallace and a Jefferson County legislative candidate in the June 2, 1970, Democratic Runoff Primary in Alabama. Only in single-member district elections can black voters argue and vote on the issues as other voters can and do. Without single-member districts their exclusion from the "core of our constitutional system"[3] will continue, with all of the manifestations of frustration that such exclusion breeds.

C. *Multi-Member Districts Are Prima Facie Constitutionally Invalid*

This Court appears to have held multi-member districts to be *prima facie* valid in *Burns v. Richardson*, 384 U.S. 73 (1966). Amici maintain that this decision should be reconsidered against the background of subsequent cases and of this record.

Standards in voting cases have changed rapidly in the last decade. See *Castro v. California*, 38 U.S.L.W. 2522 (Cal. Mar. 24, 1970), analyzing the evolution of the equal protection standard from the "rational grounds" for classification in *Lassiter v. Northampton County Election Bd.*, 360 U.S. 54 (1959). The standard began its demise in *Baker v. Carr*, 369 U.S. 186 (1962), came more directly into question when *Carrington v. Rash*, 380 U.S. 89 (1965) for the first time applied the equal protection clause to state voting requirements, was implicitly disapproved in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966), and was expressly abolished in *Kramer v. Union Free School District*, 395 U.S. 621, 627-28 (1969), and *Cipriano v. City of Houma*, 395 U.S. 701 (1969). It appears that the multi-member district neither serves a "*compelling*" state interest nor accomplishes any state interest with the "precision" required by *Kramer*.

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[3] *Carrington v. Rash*, 380 U.S. 89, 96 (1965)

Many courts have looked askance at multi-member districts for various reasons. The record and opinion here indicate that the question is ripe for re-examination.

In *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 731 (1964), this Court expressed doubt as to the desirability of multi-member districts when it said, without condemning the constitutional validity of such districts:

> One of the most undesirable features of the existing apportionment scheme was the requirement that, in counties given more than one seat in either or both of the houses of the General Assembly, all legislators must be elected at large from the county as a whole. Thus, under the existing plan, each Denver voter was required to vote for eight senators and 17 representatives. Ballots were long and cumbersome, and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies *within* the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them. Rather, each legislator elected from a multi-member county represented the county as a whole. (emphasis in original)

In *Drew v. Scranton*, 299 F. Supp. 310, 327 (M.D. Pa.), *vacated*, 379 U.S. 40 (1964), the district court noted:

> It is likewise true we think . . . that the single-member district has important advantages over the multi-member district or election at large in bringing about a better representation of the body of voters. Minority groups living in particular localities may well be submerged in elections at large but can often make their voting power much more effective in the smaller single-member district in which they may live. Moreover, a much more widespread personal contact between the representative and his constituents and knowledge by the representative of the views and desires of the voters is possible in a

single-member district than in a larger multi-member one where the number of voters is much greater and the responsibility of representation is divided among two or more representatives answerable to the same electorate.

In *Bannister v. Davis*, 263 F. Supp. 202, 209 (E.D. La. 1966) (three-judge court), the court said:

> Multi-member, multi-parish districts will be necessary to satisfy the equal-population standard while adhering to the boundaries of political subdivisions. They should, however, be avoided whenever possible. When parishes are cumulated into a single voting district with more than one senator or representative, the district should be compact and composed of adjoining parishes. If possible, parishes should not be divided between two or more districts, or subdivided to create one or more districts, although such districts may be necessary in very large urban areas.
>
> Even if a plan meets the requirements of the equal population principle, it may be invalid if it goes too far in diluting voting strength. Multi-member, multi-parish districts tend in this direction. Gerrymandering of any kind, therefore, will be closely scrutinized. Racial gerrymandering, which violates the Equal Protection Clause, will not be tolerated.

In *Dorsey v. Fortson*, 228 F. Supp. 259 (N.D. Ga. 1964), *rev'd*, 379 U.S. 433 (1965), the lower court condemned multi-member districts on the basis of inherent dilution or debasement of voting strength:

> Here the dilution or debasement is of the right of some to choose their representative. It is discrimination in another form, but we think it necessarily follows that voters in some senatorial districts cannot be treated differently from voters in other senatorial districts. The statute here is nothing more than a classification of voters in senatorial districts

> on the basis of homesite, to the end that some are allowed to select their representatives while others are not. It is an invidious discrimination tested by any standard. 228 F. Supp. at 263.

The rights of a voter to vote can be debased *en masse* just as effectively as one by one. Multi-member districts accomplish this kind of debasement. The Court now has before it a record showing the debasement and its socio-economic, politically remediable consequences.

The events of the decades prior to the decision in *Baker v. Carr*, 369 U.S. 186 (1962) demonstrated that the dilution of the voting strength of urban voters by rural dominated reapportionment plans resulted in the undermining of state government as the urban voter was pressured to turn more and more to the federal government for redress of grievances and solutions to urban problems.

Events of the past decade show the degree of frustration and the various manifestations of that frustration where a major segment of the population is excluded from meaningful participation in the affairs of local and state government, and can only turn to the federal courts or self-help for redress of their grievances and solutions to their problems. Black citizens need to be included within our system.

The decisions of this Court in *Fortson v. Dorsey* and *Burns v. Richardson* recognize the problem and the violation of our Constitution inherent in a minimization or cancelling out of the voting strength of a cognizable racial or political element in a legislative district by the employment of multi-member districts. The time has come to define a practicable remedy. The remedy provided by the district court is such a remedy. It should be affirmed.

CONCLUSION

The issue is at an impasse similar to that which population apportionment had reached at the time of *Baker v. Carr*, 369 U.S. 186 (1962). For over a century the legislatures of the states have been controlled by white legislators. The device of the at-large election of substantial numbers of legislators from multi-member districts with its inherent effect of submerging, diluting, debasing, and cancelling out all minority groups—racial, economic, and otherwise—will not only continue, it will expand in the months and years immediately ahead if the Court on the one hand recognizes the principle that the minimization or cancelling out of the voting strength of such minorities is constitutionally invalid, but on the other hand rejects proof clearly showing the existence of such elements in sufficient numbers and concentrated in such areas as to entitle them to an opportunity for direct representation if any reasonable system of single-member districts were invoked. See *Davis v. Mann*, 245 F. Supp. 241 (E.D. Va. 1965), *aff'd sub nom. Burnette v. Davis*, 382 U.S. 42 (1965); *Kilgarlin v. Martin*, 252 F. Supp. 404 (S.D. Tex. 1966), *rev'd on other grounds sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967). See generally the treatment of the subject in Note 5 Harv. Civil Rights and Civil Liberties L. Rev. 472 (1970).

The submergence of substantial black minorities into multi-member districts presents a clear constitutional violation. There is a definable and demonstrable denial of equal protection of the laws. Lines are drawn to favor arbitrarily and unfairly the white voters of the district whereby the black citizen is merely counted to increase the legislative power of the white voters without any realistic hope of sharing in that power. There is a debasement of the right of black citizens to vote and a limitation of their first amendment rights to band together for

political purposes, which is as pervasive and invidious as the restrictions on political parties prohibited by cases such as *Hadnott v. Amos*, 394 U.S. 358 (1969).

Due process requires that there be a remedy. Unless the right of such persons to elect a representative of their choosing, black or white, is prohibited by the requiring of single-member districts, or at least, multi-member districts which do not have the effect of minimizing or cancelling out their voting strength, black voters living in predominantly black areas will continue to be deprived of their right to have effective representation of their own choosing in the state legislatures of this nation. This "foundation of our representative society," *Kramer v. Union Free School District*, 395 U.S. 621, 626 (1969), must not be undermined.

Amici therefore submit that the holding of the district court requiring single-member districts for the Indiana Legislature should be affirmed.

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APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE
DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION
NO. 3017-N

E. D. NIXON, *et al.*
Plaintiffs,

ALABAMA INDEPENDENT DEMOCRATIC PARTY,
a corporation,
Plaintiff-Intervenor,

vs.
ALBERT P. BREWER, *et al.*
Defendants.

ON MOTION OF PLAINTIFFS FOR
PRELIMINARY INJUNCTION
and
ON MOTION OF DEFENDANTS FOR
DISMISSAL

OPINION

PER CURIAM:

This is a class action filed on behalf of Negro citizens residing in what is called the "predominantly Negro ghetto area" in the three most populous counties of Alabama — Montgomery County, Mobile County and

Jefferson County. The plaintiffs seek a preliminary and permanent injunction against the election of legislators, both Senators and Representatives, from these three counties on a county-at-large basis, because they claim that multi-member districting operates to minimize and cancel out the voting strength of Negroes residing in the predominantly Negro ghettos in said counties to the extent that they are deprived of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States and also in violation of the Fifteenth Amendment. The complaint further seeks a declaration of the unconstitutionality of Section 200 of the Constitution of Alabama requiring that no county be divided to create a legislative district; of the statute providing for the multi-member senatorial districts of the three counties;[1] and of the decree of this Court providing for the multi-member house of representatives district and approving and adopting the multi-member senatorial districts of the three counties.[2]

All of the plaintiffs to the present action and the classes which they represent are within the broader class bound by the opinion and decree in *Sims v. Baggett*, n. 2, *supra*. That case undertook to completely reapportion the Alabama Legislature, both the House of Representatives and the Senate, effective with the term of office of the new legislative seats therein created to commence on the day after the General Election to be held on Novem-

[1] Title 32, §§ 2 and 2(1) Code of Alabama (recompiled 1958), 1967 Supp.

[2] Sims, et al. v. Baggett, et al., C.A. 1744-N, decided on the 2nd day of October 1965, reported in 247 F.Supp. at pp. 96, *et seq.*

ber 1966 and to remain in effect until after the next decennial census.[3]

At two places in the opinion it requires that "representation in each House be divided according to county lines and that no county be subdivided to create a legislative district." (247 F.Supp. 103, repeated at 105.) Thus the opinion forbids the kind of redistricting sought by the plaintiffs.

Insofar as the complaint attacks the reapportionment or redistricting for the period covered by the opinion and decree of this Court, the complaint must be treated as an independent action seeking relief from a judgment under Rule 60(b), Fed.R.Civ.P. So treated, we think that the preliminary injunction should be denied for several reasons. The relief is not sought on the basis of newly discovered evidence or changed conditions since the date of the decree. While there have been further important developments in the applicable law,[4] basically the plaintiffs are undertaking to present the question which the Court held was not presented by the record in *Fortson v. Dorsey*, 1965, 379 U.S. 433, 439:

"It might well be that, designedly or otherwise, a

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[3] The Court's decree provides that

". . . the apportionment of the Alabama Legislature as herein ordered remain in effect without change, except by order of this Court, until the Legislature of the State of Alabama reapportions itself in accordance with the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States, after the next decennial census to be conducted in 1970, which nothing in this decree shall prevent it from doing; the apportionment of the Alabama Legislature as herein ordered shall remain in effect without any change until such action by the Legislature which shall not occur prior to the next decennial census to be conducted in 1970."

[4] See particularly Burns v. Richardson, 1966, 384 U.S. 73, and Chavis v. Whitcomb, S.D. Ind., decided July 28, 1969, . . . F.Supp. . . . , appeal to the Supreme Court of the United States now being sought.

> multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. This question, however, is not presented by the record before us."

As to other aspects of the legislative reapportionment plan for the House of Representatives, that question was not only presented but was sustained in *Sims v. Baggett.*[5]

The present plaintiffs had an opportunity in *Sims v. Baggett* to raise the questions now presented but failed to do so. There was no objection at that time to this Court's holding "that no county be subdivided to create a legislative district" (247 F.Supp. 103, repeated at 105). The complaint in the present action was filed on January 13, 1970, more than four years after the judgment was entered in *Sims v. Baggett, supra,* and at such time that a three-judge district court could not be convened for

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[5] "In Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct 498, 13 L.Ed.2d 401 (1965), the Supreme Court recognizes that multi-county, multi-representative districts, under the circumstances of a particular case, 'would operate to minimize or cancel out the voting strength of racial or political elements * * *.' The question was not raised on the record in that case. The court, therefore, held that 'under the circumstances, this issue has "not been formulated to bring it into focus, and the evidence has not been offered or appraised to decide it, our holding has no bearing on that wholly separate question." Wright v. Rockefeller, 376 U.S. 52, 58 [84 S.Ct. 603].' The Fortson case does not support the contention that multi-county, multi-representative districts are permissible regardless of their effect or the motive underlying their creation.

"In our opinion the present case falls squarely within the rationale of Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). The House plan clearly contravenes the Fourteenth and Fifteenth Amendments to the United States Constitution and must, therefore, be declared invalid."

247 F. Supp. at 110.

the hearing of the application for preliminary injunction until February 25, 1970, only three days before the expiration of the date for filing notice of candidacy for nomination to office by the Democratic Party of Alabama, the predominant political party in said State. In our opinion the complaint was not filed "within a reasonable time" within the meaning of Rule 60(b), Fed.R.Civ.P.

The plaintiffs urge that by the use of the words "except by order of this Court" in the judgment or decree of *Sims v. Baggett, supra*, this Court reserved jurisdiction to change the judgment or decree. Assuming that we have such a discretion, we do not think that it should be exercised. Clearly, this Court should not itself subdivide a county for legislative representation during the period of time that it has enjoined the Legislature from so doing, because any such subdivision is, of course, primarily a legislative function.

Nor do we think that a proper case has been made for this Court to compel legislative action. The Supreme Court has recognized that "limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system." *Reynolds v. Sims*, 1964, 377 U.S. 533, 583. The Supreme Court has further held that decennial reapportionment "would clearly meet the minimal requirements for maintaining a reasonably current scheme for legislative representation." *Id.*, 377 U.S. at 583, 584. The present reapportionment has remained in effect for less than half of the minimal ten-year period. After the completion of the 1970 census the Legislature can be expected with reasonable dispatch to reapportion both the House and the Senate in such a manner as will not deprive any voter of the equal protection of the laws as guaranteed by the

Fourteenth Amendment. The earlier action here sought would necessarily be hasty and incomplete, as well as being based upon inadequate and uncertain factual evidence. Since the Legislature has complied with this Court's decree in *Sims v. Baggett, supra,* and has been enjoined by this Court from making any changes in the reapportionment therein ordered, we think it would be unreasonable and unwise to require any legislative reapportionment prior to the time fixed in that decree, that is, prior to the first legislative session following the completion of the 1970 decennial census. In our opinion this Court should deny the plaintiffs' motion for preliminary injunction.

However, we should also deny the defendants' motion to dismiss the complaint, retain jurisdiction of the complaint, and postpone a hearing on the merits, if any hearing should be necessary, until the Alabama Legislature has reapportioned the two Houses of the Legislature or has unreasonably failed in its duty so to do.

It would, of course, be premature for this Court to pass upon the factual or legal merits of the plaintiffs' complaint. In our opinion, however, the evidence offered in support of the plaintiffs' claims, if such evidence is substantiated by the 1970 decennial census and by the further evidence then available, makes out a strong case for the consideration of the Legislature of Alabama. Indeed, in all probability, this Court would grant some relief to the plaintiffs at this time but for the existence of the reasons heretofore stated for denial of the plaintiffs' motion for preliminary injunction.

If the multi-member election of legislators to the Alabama Legislature from any county on a county-at-large basis operates to minimize or dilute the voting strength of Negroes in said county to the extent that they are de-

prived of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, then, of course, Section 200 of the Constitution of Alabama would in no way prevent the Legislature of Alabama from dividing the county into such separate legislative districts as might be needed to effect compliance with the Constitution of the United States. That is true because of the principle stated in *Reynolds v. Sims*, 1964, 377 U.S. 533, 584, that "when there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls." Similarly, nothing said in this Court's opinion in *Sims v. Baggett*, *supra*, could prevent a county from being subdivided into separate legislative districts in order to effect compliance with the Constitution of the United States.

It would be premature for this Court to rule upon the plaintiffs' claims until after the 1970 decennial census and until after appropriate action by the Legislature of Alabama. If further action by this Court then appears appropriate, more exact factual information will be available and the legal and constitutional issues will be more sharply defined.

ORDER

It is ORDERED and ADJUDGED by this Court:

1. That the plaintiffs' motion for preliminary injunction be and the same is hereby denied;

2. That the defendants' motion to dismiss the complaint be and the same is hereby denied;

3. That the hearing on the merits of the case be postponed until the further order of this Court.

Done this the 4th day of March 1970.

s/ RICHARD T. RIVES
United States Circuit Judge

s/ DANIEL H. THOMAS
United States District Judge

s/ FRANK M. JOHNSON, JR.
United States District Judge

Official Election Results

Do you want the Black Bloc Vote to elect and control the Governor's Office and our State?

Think—Only 16% of the White Voters voted for Brewer!

What Was The Deal? What Were the Promises? What would we have to pay?

MORE THAN 250,000 BLACKS-BLOC VOTED FOR BREWER

HERE ARE A FEW EXAMPLES OF THE BLOC VOTING

CHOCTAW COUNTY
Pantley—Beat 3, Box 2
BREWER 153
WALLACE 18

DALLAS COUNTY
Precinct 36, Box 21
BREWER 196
WALLACE 3

George Washington Carver Holmes Precinct 36, Box 33
BREWER 149
WALLACE 0

Lutheran School, Precinct 36, Box 35
BREWER 189
WALLACE 3

DALE COUNTY
Beat 9, Laneville
BREWER 139
WALLACE 9

JEFFERSON COUNTY
Over 50,000 Black Bloc—voted here
Washington School
BREWER 1,667
WALLACE 6

Roosevelt School—Bessemer, Box 13
BREWER 757
WALLACE 0

Parker High—Box 17
BREWER 1,313
WALLACE 9

Center Street School—Box 16
BREWER 1,781
WALLACE 6

Wenonah Junior High School—Box 14
BREWER 873
WALLACE 17

Old Ensley Police Station—Box 1
BREWER 1,220
WALLACE 6

Bryants Chapel AME Church—Bessemer
BREWER 561
WALLACE 3

MONTGOMERY COUNTY
Hamner Hall—Precinct 2N
BREWER 1,523
WALLACE 271

Cleveland Ave. Fire Station, Precinct 2-S-1
BREWER 1,647
WALLACE 166

SUMTER COUNTY—Whitfield
BREWER 121
WALLACE 10

TALLADEGA COUNTY
College Hill Area, Box 17-A & 17-B
BREWER 597
WALLACE 22

TUSCALOOSA COUNTY
Druid High—Beat 16, Box 19-A
BREWER 204
WALLACE 1

Druid High—Beat 16, Box 19-B
BREWER 230
WALLACE 1

MOBILE COUNTY
Davis Recreation Center—Ward 10
BREWER 1,848
WALLACE 32

Pol. Adv. by Rank & File Labor Comm., Bill Skinner, Mulga, Ala. Chmn.

THIS IS THE WAY THE NEGRO BLOC VOTE WENT

MAY 5 For HOUSE PLACE 9

Do You Want the Negro Bloc Vote to CONTROL Your Jefferson County Legislators?
If You DON'T Want Such Control, Then Vote For

TOMMY WATKINS

An Experienced, Qualified and Dependable Legislator Who Will Be Fair To All Our Citizens

For HOUSE PLACE 9

HERE IS HOW THE NEGRO BLOC VOTE WENT MAY 5 IN THESE PREDOMINANTLY NEGRO BOXES:

HUDSON SCHOOL
PRECINCT 7–BOX 4
DOSS 1385
WATKINS 42

CITY AUDITORIUM
PRECINCT 8–BOX 1
DOSS 1067
WATKINS 145

WASHINGTON SCHOOL
PRECINCT 9–BOX 4
DOSS 1192
WATKINS 61

PARKER HIGH GYM
PRECINCT 9–BOX 17
DOSS 845
WATKINS 58

WENONAH JUNIOR HIGH
PRECINCT 9–BOX 14
DOSS 758
WATKINS 30

FINLEY AVE. SCHOOL
PRECINCT 7–BOX 5
DOSS 650
WATKINS 35

OLD POLICE COURT ROOM, ENSLEY
PRECINCT 5–BOX 1
DOSS 830
WATKINS 53

ROOSEVELT SCHOOL (Bessemer)
PRECINCT 1–BOX 13
DOSS 769
WATKINS 15

CENTER STREET SCHOOL
PRECINCT 9–BOX 16
DOSS 1441
WATKINS 75

McCAW SCHOOL
PRECINCT 6–BOX 2
DOSS 505
WATKINS 31

Pd. pol. adv. by Don White, 5401 9th Ave., S., B'ham